Supreme Court, U.S.
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No. 99-1913

In the Supreme Court of the United States

OCTOBER TERM, 1999

TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER,

v.

NEW ENGLAND POWER COMPANY, NEW ENGLAND ELECTRIC SYSTEM (NEES), PACIFIC GAS & ELECTRIC COMPANY, AND PG&E CORPORATION,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS PACIFIC GAS & ELECTRIC COMPANY AND PG&E CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Respondent Pacific Gas & Electric Co. ("Pacific Gas") is a wholly-owned subsidairy of respondent PG&E Corp. ("PG&E"). PG&E is a publicly traded public utility holding company. PG&E has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents Pacific Gas and PG&E adopt the Statement of Respondents New England Power Company ("NEP") and New England Electric System ("NEES"). As NEP notes, this lawsuit is essentially a dispute over a power contract between NEP and its former customer, the Town of Norwood ("Norwood"), which arises out of the restructuring of the electric utility industry in Massachusetts and Rhode Island and the divestiture of NEP's non-nuclear power generating assets.

Pacific Gas and PG&E have nothing to do with the underlying dispute between Norwood and NEP. Pacific Gas and

PG&E are involved in this case only because each is (or was) the corporate parent of certain subsidiaries which themselves are only tangentially related to the contract dispute. PG&E, a public utility holding company, is the ultimate parent of USGen New England, Inc. ("USGenNE"), which acquired NEP's non-nuclear generating assets. Pacific Gas is a regulated electric utility serving a franchise service territory located in Northern and Central California. Pacific Gas was the parent of U.S. Generating Company ("USGen"), a California general partnership, which participated in the Massachusetts regulatory settlement leading up to the divestiture of NEP. The only issue raised in the petition that involves respondents Pacific Gas and PG&E, and the only issue addressed in this opposition, is the dismissal by the court of appeals of Norwood's alleged horizontal price fixing claim under Section 1 of the Sherman Act.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Pose Any Novel Or Important Issue With Respect To Section 1 of The Sherman Act Which Should Be Reviewed By This Court.

As Petitioner acknowledges, "[t]he court of appeals dismissed Norwood's Section 1 Sherman Act claim *solely* on the ground that it 'does not constitute horizontal price fixing', but 'is an ordinary vertical transaction' and 'did not set rates for other wholesale suppliers'." Pet. at 14-15 (emphasis added). Indeed, the court of appeals' entire discussion of this issue is contained in one paragraph of its opinion:

> Norwood also makes a section 1 claim that the standard offer rates New England Power promised to other retailers as part of the settlement somehow constitute horizontal price fixing. But offer of those rates to customers is an ordinary vertical transaction, and the settlement did not set rates for other wholesale suppliers; USGenNE's later

> assumption of the obligation is simply the transfer of the seller's existing obligation incident to a sale of assets.

Pet. App. at 22a (footnote omitted).

Petitioner's contradictory assertion that the court of appeals dismissed this claim in reliance on the filed rate doctrine is simply incorrect.[1] The dismissal of the Section 1 claim did not rely upon the filed rate doctrine, or any concept of antitrust immunity. As the court of appeals' opinion clearly states, and Petitioner itself acknowledges, the court of appeals relied solely on the conclusion that the conduct alleged "is an ordinary vertical transaction" that does not offend Section 1. This conclusion is correct, entirely unremarkable, and poses no issue warranting review by this Court. Contrary to Petitioner's argument, the court of appeals' conclusion does not contradict the allegations in the complaint; indeed, Petitioner's brief acknowledges that the "fixed" standard offer rates were only available to NEP's affiliates. Pet. at 4.

[1] The court of appeals did rely on the filed rate doctrine in dismissing Petitioner's claim under Section 2 of the Sherman Act, but that claim is not directed at PG&E or Pacific Gas and is addressed in NEP's opposition brief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PACIFIC GAS & ELECTRIC COMPANY and PG&E CORPORATION,

By their attorneys,

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